Supreme Court, U.S.
FILED

10-342 SEP 7 2010

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

STEFANO PICCIOTTO AND OTHERS
Petitioners,

v.

MASSACHUSETTS
Respondents.

On Petition For Writ Of Certiorari
To The Supreme Judicial Court For
The Commonwealth Of Massachusetts

PETITION FOR WRIT OF CERTIORARI

Stefano Picciotto
Judith Picciotto
Melita Picciotto
Athena Picciotto
418 Lafayette Street
Salem, MA 01970
(978) 741-0218

QUESTIONS PRESENTED

The Petitioners seek review of any one, or a combination of, the following questions:

1. Does it violate due process when a trial devolves into what the press refers to as "a circus-like atmosphere" in which the trial judge allows jurors to come to court dressed in Halloween costumes, allows the attorneys for the opposition to pass candy and joke memorabilia to the jurors, and then allows them to provide jurors with a cast list of which popular Hollywood actors should play them in a possible movie of such an amusing trial?

2. Does it violate due process when the sitting judge has an improper *ex parte* meeting with a party to the litigation during the pendency of the action, is offered something of value at that meeting, and, when confronted by the other parties, denies that the meeting occurred, until said judge is actually presented with the sworn deposition testimony of the party to the litigation who admitted to their *ex parte* meeting?

3. Is it permissible for a state appellate court to change an uncontested factual state court record as a mechanism to uphold an otherwise tainted judgment, and then deny the defendants any appellate remedy?

4. Does it violate due process when a defendant is deprived of the right to represent his or herself in defense of property when the court has irrefutable knowledge and warning that it is appointing ineffective counsel?

5. Does it violate due process when defendants are barred from cross-examining their own trial attorney when the court orders their own trial attorney to be put on the witness stand to testify against them?

6. Does it violate due process for the trial court to divest itself, *sua sponte*, of *in rem* interpleader jurisdiction of court-deposited settlement funds, without providing the parties with notice or opportunity to be heard, in order to award 12% pre and post-judgment interest to the attorney lienholders parties, rather than awarding the interest that is actually generated by the court-held fund itself?

7. As a matter of law, may the trial court divest itself of *in rem* interpleader jurisdiction of court-deposited funds, without divesting itself of, or distributing the *rem* (court-deposited fund)?

8. When the post-judgment interest awarded by the court doubles or trebles the jury award by millions of dollars, is it grossly disproportional to the gravity of the *alleged* triggering offense, and thus unconstitutional pursuant to the Eighth Amendment of the Constitution of the United States of America?

9. Does a state court judgment that is in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution ever acquire validity, either through the state creating a false factual record, or through the doctrine of latches?

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are as follows:

Petitioners/Plaintiffs:

Melita Picciotto, Pro se
Judith Picciotto, Pro se
Stefano Picciotto, Pro se
Athena Picciotto, Pro se

Respondents/Defendants:

The Hon. Mark V. Green
The Hon. R. Malcolm Graham
The Hon. Andrew R. Grainger

Represented by Maryanne Reynolds, Esq.
Assistant Attorney General
Government Bureau
One Ashburton Place
Boston, MA 02108
(617) 727-2200, ext 2925

TABLE OF CONTENTS

Questions Presented i

Parties to The Proceeding iv

Table of Contents v

Table of Authorities viii

Table of Appendices xiv

Opinion Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions involved . . 1

Statement of the Case 2

Statement of Material Facts 4

Summary of Argument and
Reasons for Granting the Writ 15

Argument 16

I. THE STATE COURT MUST FURNISH A REMEDY FOR THE VIOLATION OF VESTED LEGAL RIGHTS; OTHERWISE, DUE PROCESS BECOMES A MERE FAÇADE 16

A. Under The Due Process Clause Of The United States Constitution, Litigants Have A Right To Have A Legal Ruling That Is Based On A Record That Is Accurate And Not Manipulated To Allow For An Unwarranted Result 16

Contents

B. The Respondents Have Conceded That They Based Their Ruling On Their Changes to The Uncontested Factual Record That Was Before Them, And That The Uncontested Factual Record Demonstrates That The Trial Judge Had An Improper Ex Parte Meeting With A Party To The Litigation During The Pendency Of The Case, And Tried To Hide It From The Defendants 18

C. Ordering Litigants To Forfeit Millions Of Dollars In Excessive Punitive Interest Even Though The Money Was Put On Deposit In The Court Register For An Interpleader Action Is In Violation Of The Eighth Amendment And The Fourteenth Amendment Of The United States Constitution. 26

D. The Respondents Have Conceded That They Erred In Reviewing The Prayers For Relief That Were Submitted To Them Through The Appellate Briefs, And That Substantial Harm Resulted, But They Arbitrarily Refused To Grant Any Relief. 29

E. Due Process Is Violated When A Trial Devolves Into A "Circus" Of Jurors Wearing Halloween Costumes And The Trial Judge Allows The Opposition To Pass The Jurors Candy And Joke Memorabilia. 33

Contents

F. The State Court Judgment Violated Due Process Because The State Court Deprived Petitioner Melita Picciotto Of The Right To Represent Herself In Defense Of Her Property, Imposed Counsel Upon Her Who Was Ordered To Be A Material Witness Against Her At Trial, And Then Denied The Petitioners The Right To Cross-Examine Said Counsel/Material Witness At Trial. 35

CONCLUSION 41

TABLE OF CITED AUTHORITIES

Page

Cases:

Amoco Transport Company v. Dietze, Inc.,
582 Fed. Supp. 804 (1984) 28

Andrews v. Belcher Power Corp.
780 F.2d 124, 137 (1st. Cir. 1985) 36

Caperton v. Massey,
1556 U.S.___ ; 129 S.Ct. 2252: 173 L.Ed.2d 1208;
2009 U.S. LEXIS 4157. 23

Cooker & Gell v. Hartmarx Corp.,
496 U.S. 384, 402, 110 S. Ct. 2447, 110 Ed.
2d 35 (1990) 15, 17

Commission On Judicial Performance V.
Joseph Lewis No. 2004-Jp-01002-Sct Supreme
Court Of Mississippi,
913 So. 2d 266 (2005) 22

Connally v. Georgia,
429 U.S. 245, 250-251 (1977). 25

Copper Indus., Inc. v. Leatherman Tool Group,
Inc., 532 U.S. 424, 433-434, 121 S.Ct. 1678, 149
L.Ed. 2d 674 (2001) 27

Crawford v. Washington,
541 U.S. 36 (2004). 16, 40

Demoulas v. Demoulas Super Mkts., Inc.,
428 Mass. 543, 551-552 (1998) 19

Electric Power Supply Association, Petitioner v.
Federal Energy Regulatory Commission,
Respondent Massachusetts Municipal Wholesale
Electric Company, Et Al., Intervenors, The District
Of Columbia Circuit,
391 F.3d 1255; 364 U.S. App. D.C. 48 (2004) . . . 22

Estes v. Texas,
381 U.S. 532, 536 (1965) 34

Faretta v. California,
422 U.S. 806, 834 (1975) 36

Fay, Warden et al v. Noia,
372 U.S. 391 (1963) 17

Fuentes v. Shevin,
407 U.S. 67 (1972) 31

Garrison v. Lacey,
362 F.2d 798, 799 (1oth Cir. 1996) 36

In re Brown,
427 Mass 146, 691 N.E.2d 573 (1998). 9

In re DeSaulnier,
274 N.E.2d 454, 360 Mass. 757 (1971) 18

In re Murchison,
349 U.S. 133 (1955) 18, 25

Melendez-Diaz v. Massachusetts,
557 U.S. ____ (2009). 40

Marshall v. Jerrico, Inc.,
446 U.S. 238, 242 (1980) 25

Mitchell v. W.T. Grant Co.,
416 U.S. 600 (1974) 31

North Georgia Finishing, Inc. v. Di-Chem, Inc.,
419 U.S. 601 (1975) 31

O'Reilly v. New York Times,
692 F.2d 863, 867 (2d Cir. 1982) 36

Osborn v. Bank of United States,
22 U.S. (9 Wheat.) 738, 6 L. Ed. 204 (1824). 28

Powers v. Metropolitan Life Insurance Company,
142 App. DC 95m 439 F2d 605 (1971) 28

Price Bros. Co. v. Philadelphia Gear Corp.
629 F.2d 444 (6th Cir. 1980). 10

Taylor v. Hayes,
418 U.S. 488, 501 (1974) 25

Turner v. Louisiana,
379 U.S. 466 (1965) 25

United States v. Bajakajian,
524 U.S. 321, 328, 118 S. Ct. 2008, 141
L.Ed. 314 (1998) 15, 25, 33

Ungar v. Sarafite,
376 U.S. 575, 588 (1964) 25

United States of America v. Bobby B. DeLaughter,
(2009) U.S. Dist. LEXIS 48483 21

Walker v. A. L. Lockhart, Superintendent of the Arkansas Department of Corrections,
726 F.2d 1238 (8th Cir. Ark. 1984) 18

Republican Party of Minn. V. White,
536 U.S. 765, 793 (2002) 23

Salvador Martinez v. Court of Appeals California 4th Appellate District,
528 U.S.152, 165 (2002) 37

Sniadach v. Family Fin. Corp.,
395 U.S. 337 (1969) 31

Tumey v. Ohio,
273 U.S. 510, 532 (1927). 23

Withrow v. Larkin,
421 U.S. 35, 47 (1975) 25

Zabin, et al v. Picciotto,et al
73 Mass. App. Ct. 141 (2008) 2, 7, 10, 28, 32

United States Constitution:

U.S. Const. First Amend. 1

U.S. Const. Fifth Amend. 1, 30

U.S. Const. Eighth Amend. 2, 26, 27, 28, 30, 33

U.S. Const. Fourteenth Amend. 2, 26, 27, 30, 33

Federal Statutes

U.S.C. § 1341 and 18 U.S.C § 1346. 21

28 U.S.C. § 455(a) 9

5 U.S.C.S. § 557(d)(1)(C) 15, 22

Massachusetts Statutes

M.G.L. c. 231 § 6C 29

Massachusetts Rules:

Mass. R. Civ. P. 22 . . . . . 5, 21

Mass. R. App. P. 27 17

Mass. R. App. P. 27.1 17

Mass. SJC Rule 3:07 § 3.4(a)(b) 22

Mass. Superior Court Standing Order 9-80 20

Miscellanous:

45 *Am.Jur.*2d Interpleader § 40 (1969) 28

Anno. 15 *A.L.R.*2d 473 (1951) 28

Fordham Law Review, 55 Fordham L. Rev. 1109 (May 1987) 36

"Letting the Laity Litigate: The Petition Clause and Unauthorized Practice Rules," 132 *U. Pa. L. Rev.* 1515, 1531-32 (1984) 36

"The Right of Self-Representation and the Power of Jury Nullification," 28 Case W. Res. 269, 271 n.7 (1978) 37

University of Chicago Law Review, 55 U. Chi. L. Rev. 659 (Spring 1988) 36

TABLE OF APPENDICES

Page

Appendix A – Opinion Of The Supreme Judicial Court Of The Commonwealth Of Massachusetts Dated June 9, 2010 . . . . . 1a

Appendix B – Opinion Of The Appeals Court Of The Commonwealth Of Massachusetts Dated November 18, 2008 . . . . . 4a

Appendix C – Petition For Rehearing Of Melita Picciotto dated December 2, 2008 . . . . . 54a

Appendix D – Petition For Rehearing Of Stefano And Judith Picciotto Dated December 2, 2008 . . . 75a

Appendix E – Motion Of Melita Picciotto To Correct The Record Dated December 15, 2008 . . . 96a

Appendix F – Appeals Court Ruling Of January 22, 2009, That No Appeal Lies From The Panel's Revision Of The Uncontested Factual Record That Was Before Them 98a

Appendix G – September 10, 2009 Ruling Of The Massachusetts SJC Single Justice Denying Certiorari After Petitions For Rehearing And Further Appellate Review For Correction Of The False Record Had Been Denied 100a

Appendix H – United States Constitution Amendment 1 . . . . . .102a

Appendix I – United States Constitution Amendment V 103a

Appendix J – Excessive Fine Clause Of The United States Constitution Amendment VIII 104a

Appendix K – United States Constitution Amendment XIV. 104a

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The memorandum and order of the Appeals Court of Massachusetts, which is at issue, is reported at 73 Mass. App. 141; 896 N.E.2d 937 (2008). [App. 4a] FAR was denied by 453 Mass. 103, 901 N.E.2d 138 (2009) and 453 Mass 1105, 902 NE2d 947 (2009), and the Massachusetts Supreme Judicial Court ("SJC") denied final appeal by Picciotto v. Appeals Court, 457 Mass. 1002; 927 N.E.2d 998 on June 9, 2010. [App. 1a]

JURISDICTION

The Massachusetts SJC denied review of this case on June 9, 2010. [App. 1a] The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions involved in this case are:

1. The Due Process Clause of the Fifth Amendment of the U.S. Constitution, which applies to the states under the incorporation doctrine; [App. 103a]

2. The Petition Clause of the First Amendment to the U.S. Constitution; [App. 102a]

3. The Excessive Fine Clause of the Eighth Amendment to the U.S. Constitution; [App. 104a]

104. The Equal Protection Clause of the Fourteenth Amendment ; [App. 104a] and

5. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. [App. 104a]

STATEMENT OF THE CASE

Nature Of The Case And Prior Proceedings

On November 18, 2008, a panel of the Massachusetts Appeals Court, *i.e.*, "the Respondents", created a false record in its decision in the case of Zabin v. Picciotto, 73 Mass. App. Ct. 141 (2008). [App. 4a] The new record was rife with errors, misunderstandings, and alterations that were in direct contradiction to the uncontested factual record that was in front of the Respondents. However, the Respondents rendered a ruling based upon the new facts that they created. [App. 54a and 75a]

The Petitioners filed a motion with the Respondents to cause the Respondents to correct the most critical of the changes that they had made to the uncontested factual record. [App. 96a] The Petitioners further filed Petitions for Rehearing. [App. 54a and 75a]

The motion to correct the record and the Petitions for Rehearing, together with the uncontested supporting affidavit, put the Respondents on notice of precisely which critical

elements of the *uncontested* factual record had been changed. The Respondents refused to correct their alterations to the record, and denied any rights to relief. [App. 98a]

The Petitioners filed a notice of appeal. **The Respondents ruled that "no appeal lies from this action of the panel** "(Green, Graham, Grainger JJ)." [App. 98a] [Emphasis added], and they would not allow an appeal to go forward.

Therefore, on March 13, 2009, the Petitioners filed a Petition for Writ for Certiorari with the single justice of the Massachusetts SJC in order to cause the Respondents to correct the critical errors and/or changes in regard to the factual record.

On June 3, 2009, the Respondents answered the Writ. The Respondents conceded that their ruling was based on a false factual record; however, they made no attempt to correct the record. On June 22, 2009, the Petitioners moved for summary judgment. [App.100a]

The single justice dismissed the Writ of Certiorari against the Respondents by ruling that the Respondents' errors and changes in regard to the uncontested factual record was:

> . . . reviewable in the normal appellate process, *i.e.,* by petition for rehearing filed with the Appeals Court, or by application for further appellate review filed with the Supreme Judicial Court. [App. 100a]

Said applications are discretionary. Since the Petitioners had (as the state court acknowledged), submitted said applications, but had not been granted review[1] [App. 1a and 98a], the Petitioners appealed the Appellate Court's ruling that "no appeal" lies from the panel's revisions of the factual uncontested record [App. 98a] to the Massachusetts SJC. However, the Massachusetts SJC refused to grant relief and upheld the single justice. [App. 1a]

Statement Of Material Facts

1. This case arises from a global settlement of toxic tort actions and the discovery of a bankruptcy fraud, for which the Petitioners and others settled on January 6, 1999, for $9 million.

2. During the bankruptcy proceedings, the Petitioners had been represented by a series of attorneys (including Robert V. Costello) ("the attorney-lienholders"), who had withdrawn instead of allowing the Picciottos and their accountant to personally examine the books and records of the debtor, as is allowed them by law. Thus, the relationship with the attorney-lienholders had broken down long before the settlement occurred.[2]

---

[1] The denials were not based on the merits, but were arbitrarily denied without a substantive review.

[2] The attorney-lienholders claimed that there was no bankruptcy fraud and that there was no insurance coverage, and that pursuing the books and records of the debtor would be a waste of their time and the Picciottos' money. The evidence of the subsequent discovery of the bankruptcy fraud and the value

3. The settlement occurred through a successor counsel by the name of Dana E. Casher, who secured access for the Picciottos to the debtor's records.

4. As attested to by the attorney who represented Travelers at the time of the settlement, the Petitioners sought to put aside one-third of the entire settlement to satisfy the claims of the attorney-lienholders.

5. That proposal did not satisfy the attorney-lienholders. Instead, they banded together and demanded the entire nine million-dollar settlement amount based on their respective (and successive) contingent fee agreements.

6. The attorney-lienholders' excessive fee demands led Travelers to file an interpleader action in the Suffolk Superior Court and deposit virtually all the settlement funds into the court register, pursuant to Mass. R. Civ. P. 22.

The Interpleader Action

7. The Massachusetts Superior Court has a rotation system of the judges sitting in the sessions in order to ensure fairness to the litigants.

8. In May of 1999, Judge Mitchel J. Sikora sat in the Suffolk County session in which the interpleader action was filed.

---

of the pro se work of Melita Picciotto and United Policy Holders of America was barred from the jury by the trial judge.

9. While Judge Sikora was sitting on the case, one of the parties to the interpleader litigation, Robert V. Costello, had an improper *ex parte* meeting with the judge. He later admitted in a deposition that he had offered Judge Sikora something of value at such *ex parte* meeting.

10. After said *ex parte* meeting, Judge Sikora, instead of allowing the case to flow through the normal channels, assumed his own *de facto* assignment of the case, and held hearings in another county (Norfolk County), where he was then generally assigned.

11. Upon discovery of the improper *ex parte* meeting, the Petitioners questioned Judge Sikora.

12. Judge Sikora denied that the meeting had occurred.

13. Judge Sikora only admitted to the improper *ex parte* meeting when he was confronted with the deposition testimony of attorney-lienholder Costello.

14. The Petitioners filed a motion to recuse.

15. Judge Sikora denied said motion.

16. As has been averred by the Petitioners' interpleader action trial attorney, under the pains and penalties of perjury, during the interpleader proceedings Judge Sikora refused to allow a stenographic record, made false findings, and then refused to grant evidentiary hearings on his false findings.

17. Judge Sikora further deprived Petitioner Melita Picciotto of the right to represent herself, removed the Petitioner from the courtroom, denied a request to have a camera in the courtroom to document the Petitioner's courtroom behavior, denied an evidentiary hearing on his wrongful findings of fact, imposed an unwanted counsel[3] on the Petitioner, and then ordered that same counsel to testify against the Petitioners at the trial, without allowing cross-examination of said counsel.

18. Judge Sikora imposed upon the parties a conversion of the interpleader action into an action whereby parties were designated as plaintiffs and defendants to file claims against each other rather than claims against the settlement proceeds that had been deposited with the court.[4] Instead of having everyone be a claimant to such proceeds, he designated the attorney-lienholders as plaintiffs to pursue claims against their former clients; and he designated the former clients as the defendants.

19. The Petitioners had no notice or knowledge of said conversion, and believed that they were in an interpleader action in which each of their entitlements to portions of the settlement proceeds would be determined by the jury.

---

[3] Notably, the court-imposed counsel informed the trial judge that she objected to being appointed counsel as well.

[4] This is reported in the decision in the case of Zabin v. Picciotto, 73 Mass. App. Ct. 141 (2008). [App. 4a]

20. At trial, Judge Sikora allowed the attorney-lienholders to seek fees in *quantum meruit* against their respective former clients with respect to the entire $9 million settlement amount, without first requiring that a determination be made of what portion each of the respective former clients was entitled to obtain from such settlement amount.

21. This element was critical to the action, because not all of the attorney-lienholders had represented all of the clients, and several separate and unrelated claims had been globally settled.

22. At trial, Judge Sikora allowed the jurors to come to court dressed in Halloween costumes; and he allowed the counsel for attorney-lienholder Costello to pass candies, joke memorabilia, and a cast list of who would play whom in the movie that would be made with respect to the case. The press described this as a "circus-like" atmosphere in the courtroom.

23. The Petitioners never agreed to such a spectacle, and they were appalled.

24. After trial, the court reported several of the critical trial tapes that contained appealable issues and documentary evidence "lost"[5], even though they were at all times in the care and control of the court.

25. Contrary to the Respondents ruling, the pre-trial Motion to Recuse Judge Sikora contained affidavits that absolutely challenged the judge's

---

[5] Among other things, the tapes contained the objections to the attorneys for the attorney lienholders interacting with, and wrongfully gifting, the jurors.

impartiality, and noted the judge's manifest bias. In fact, pages 1 and 2 of the pre-trial Motion to Recuse (items 2 and 3) asserted as follows:

> 2. Judge Sikora has demonstrated his prejudice against [the Petitioners] as well as his bias in favor of Albert Zabin and Schneider, Reilly, Zabin & Costello, P.C., on several occasions.
>
> 3. The Picciottos have established that Judge Sikora has a social relationship with one of the plaintiffs in this action, with whom he had an ex parte communication after having assumed control of this case, such as to make it impossible for him to satisfy the standard required of a judge by 28 U.S.C. § 455(a) (expressly adopted in Massachusetts in *In re Brown*, 427 Mass. 146, 691 N.E.2d 573 (1998) that a judge avoid "even the appearance of impropriety."

The recusal motion further pled:

> The discovery that the communication between Mr. Costello and Judge Sikora (which the judge denied, but Mr. Costello had testified to under oath at deposition) in which Mr. Costello invited Judge Sikora to serve on the alumni board of Boston College Law School occurred after Judge Sikora had assumed control of this litigation in which Mr. Costello seeks substantial personal benefit, make Judge Sikora's recusal

> mandatory. See *Price Bros. Co. v. Philadelphia Gear Corp.* 629 F.2d 444 (6th Cir. 1980).

The recusal motion additionally pled:

> Both the judge's personal interests and those of his old friend Mr. Costello (who personally seeks to benefit by millions in this case) make [Judge Sikora's] continued participation in this action impossible.

26. The recusal motion was supported by affidavits of bias from Melita Picciotto, and co-defendants Juan Nunez and Stefano Picciotto.

27. The motion was further supported by the affidavit of Dana E. Casher, the trial attorney imposed on Melita Picciotto by the state court (against both of their wills), averring that she was attesting to the facts in good faith, pursuant to her *duties as an officer of the court*. At item 6 of said affidavit, Attorney Casher stated the following:

> As a final matter, in May or June, 2000, after having first learned of the social relationship between Judge Sikora and Mr. Costello at the deposition of Mr. Costello in April, I made an oral motion for the Judge to recuse himself in open court with the express intent of complying with both Rule 7 of the Mass. R. of Civ. P. (which permits an oral motion in open court) and with the common law regarding recusal which

> requires "prompt" action upon receipt of information which implicates the Court's duty to avoid "even the appearance of partiality." Judge Sikora stated that while he had, in fact, attended law school with Mr. Costello, contrary to Mr. Costello's testimony under oath and the information obtained from the law school alumni office, his only contact with Mr. Costello since 1969 was an occasional greeting in passing. And he refused to recuse himself.
>
> Signed this 12th day of September, 2001, under the pains and penalties of perjury,
>
> /S/ Dana E. Casher
> Dana E. Casher

28. Mr. Costello, as officer and major stock holder of Schneider, Reilly, Zabin & Costello, P.C., was a litigant in the action at issue.

29. The record before the Appellate Justices (the Respondents) took special pains to clearly and repeatedly identify Mr. Costello as a "plaintiff" who was "**a party**"[6] to the litigation and was personally seeking to benefit by millions of dollars through said action.

30. The fact that Mr. Costello had an improper *ex parte* meeting with the trial judge during the

---

[6] All emphases were in the original documents before the state court.

pendency of the case was not contested by the attorney-lienholders during the trial of the subject action, nor did they do so during the appeal.

31. Attorney-lienholder Costello has benefited in the millions of dollars by the judgment in favor of Schneider, Reilly, Zabin & Costello, P.C., including the application of an additional $1,804,037.08, in interest alone[7]. He obtained such benefit even though his firm *caused* the litigation by serious overreaching[8], and then refused to accept payment of its judgment, after judgment entered (allowing interest to continue to accrue at 12% for several years).

The Additional Relief Sought In The Appellate Briefs

32. On page 45 of Petitioner Athena Picciotto's brief, Athena Picciotto asked the Appellate Justices (the Respondents) to review the constitutional implication of the award of post-judgment interest. The legal argument was framed on page 45 of her brief as follows:

> THE LOWER COURT ERRED WHEN IT IMPOSED . . . POST-JUDGMENT INTEREST AND COSTS

---

[7] That amount does not include the additional millions in interest that the court also awarded to the other attorney lienholders.

[8] The overreaching was barred from the jury's knowledge.

> In November of 2002, Athena Picciotto moved the state court to pay Attorney Gilleran and all of the other attorney parties, so that no "punishment" interest would continue to accrue (A. 671-686). The trial court abused its discretion by "punishing" the wrong party.

33. The Petitioners also argued in their reply brief dated September 14, 2007, that each of the attorneys should not have been allowed post-judgment interest ". . . after the time that [they] could have collected the amount of [their] judgments[s] but declined to do so." Starting on page 17 of their reply brief, the Petitioners stated the following:

> In November of 2002, Melita Picciotto and Athena Picciotto filed a motion seeking to have the judgments that had been obtained by the Attorneys paid from the settlement funds that the trial court was holding. The matter went before the single justice (McHugh, J.) and **the Attorneys opposed being paid.** By such opposition, the Attorneys became the cause of their not being able to use the monies that they had been awarded, so they should not have received any interest from and after this point.

34. After the Appellate Justices failed to address the exorbitant interest that was awarded to the

attorney lienholders in their November 18, 2008, decision and order, the Petitioners urged the Appellate Justices, through a Petition for Rehearing, to address the issue.

35. However, the Appellate Justices refused to address this important issue, and its constitutional implications.

36. The jury award to the Zabin/Costello parties was in the sum of $1,057,057.60. However, the court awarded the Costello and his firm, alone, an additional $1,804,037.08 in interest, for a total of approximately $3 million.

37. Judge Sikora imposed prejudgment and postjudgment interest upon the Petitioners and others under M.G.L. c. 231, § 6C as a result of his having converted the subject action from an interpleader action (where interest would be awarded based upon such interest as would be earned by the funds at issue while invested by the court) to one whereby the attorney-lienholders, as the designated plaintiffs, would be entitled to interest as if their recovery was for breach of contract by their former clients for not having paid them fees from the settlement proceeds. This imposition was unfair, since the former clients had no control over such proceeds once Travelers filed the interpleader action, and deposited most of the settlement funds with the court praying for the court to determine what portions of such proceeds should go to the former clients and what portions should go to the attorney-lienholders.

SUMMARY OF ARGUMENT AND

REASONS FOR GRANTING THE WRIT

Judicial integrity is a state interest of the highest order. A judge who has an improper *ex parte* meeting with a party to the litigation and deliberately conceals the improper meeting until confronted with the proof, violates 5 U.S.C.S. § 557(d)(1)(C), and further violates due process because said judge denies the other parties to the litigation their constitutional guarantees to an impartial tribunal. (Pages 22-26) A state court's manipulation of a factual uncontested court record in order to change the results constitutes an abuse of discretion. See Cooker & Gell v. Hartmarx Corp., 496 U.S. 384, 402, 110 S. Ct. 2447, 110 Ed. 2d 35 (1990). Litigants have a vested constitutional right to receive rulings from the state court that are based on the uncontested factual record. (Pages 16-21) The manipulation of a state court record allows for deprivation of property without due process of law. (Page 16-21) An award of interest in the millions of dollars, when funds are put on deposit in the court register through an interpleader action, constitutes an unconstitutional forfeiture. See United States v. Bajakajian, 524 U.S. 321, 328, 118 S. Ct. 2008, 141 L.Ed. 314 (1998). The award is all the more egregious when the forfeiture occurs after the litigants moved the court to pay the judgments from the funds being held in the court register, but the attorney lienholders refused to accept the offer. (Pages 26-33) A trial that is conducted with jurors dressed as a circus clown, a priest, a nun, a stop

light, a court jester, etc., while the opposition treats them with candies and joke memorabilia does not constitute a fair trial before a fair tribunal. (Pages 33-35) The right to self representation in defense of one's property should be a constitutional right, however, there is split authority on this issue. (Pages 35-40) In defense of one's property, the court cannot impose an unwanted counsel who is also slated to be a material witness in the same case. (Page 35-40) Furthermore, in defense of one's property, a court cannot deny a defendant the right to cross-examine said counsel when said counsel is put on the witness stand to testify against her own client. (Page 35-40) Testimony that is not subject to cross-examination is inadmissible in criminal trials. The same standard should be applied in civil cases involving property rights. "'The right to cross-examination . . . is essentially a 'functional' right designed to promote reliability in the truth-finding functions of a . . . trial."; Crawford v. Washington, 541 U.S. 36 (2004).

ARGUMENT

I. THE STATE COURT MUST FURNISH A REMEDY FOR THE VIOLATION OF VESTED LEGAL RIGHTS; OTHERWISE, DUE PROCESS BECOMES A MERE FAÇADE.

A. Under The Due Process Clause Of The United States Constitution, Litigants Have A Right To Have A Legal Ruling

That Is Based On A Record That Is Accurate And Not Manipulated To Allow For An Unwarranted Result.

"Both a mistake of law and a clearly erroneous finding of fact constitute an abuse [of discretion]." Cooker & Gell v. Hartmarx Corp., 496 U.S. 384, 402, 110 S. Ct. 2447, 110 Ed. 2d 35 (1990). However, in the state court the Petitioners have not been able to obtain relief. Massachusetts has abolished the writ of error. The Petition for Rehearing and the Petitions for Further Appellate Review are discretionary.[9] Thus, they "do[ ] not provide a normal appellate channel." Fay, Warden et al v. Noia, 372 U.S. 391 (1963). In any case, neither the FAR nor the Petitions for Rehearing were granted. Thus, the Petitioners are stuck with a ruling by a Massachusetts Appellate Panel that should have been reviewed for abuse of discretion,[10] but was not.

Due process demands that the State cannot create a false record and then use that false record to deprive citizens of their property, especially when the State is the judiciary, *i.e.*, the third branch of government. Creating a false record for the financial benefit of insiders of a court "represents a significant departure from the normal appellate process . . ." ; Walker v. A. L. Lockhart, Superintendent of the Arkansas Department of Corrections, 726 F.2d 1238 (8th Cir. Ark. 1984) and constitutes "constitutional errors of great magnitude." Walker v. A. L.

---

[9] *See* Mass. R. App. P. 27 and Mass. R. App. P. 27.1

[10] *See* Cooker & Gell v. Hartmarx Corp., *supra*.

Lockhart, Superintendent of the Arkansas Department of Corrections, *supra.* Thus the subject action should have been reviewable by the Massachusetts SJC, given said court's power of superintendence of its lower courts. *In re* DeSaulnier, 274 N.E.2d 454, 360 Mass. 757 (1971). However, the Massachusetts SJC refused, even though U. S. Supreme Court Chief Justice Marshall has stated:

> The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.

The false facts that the Respondents created on which to base their rulings violated "the basic requirement of due process"; *In re* Murchison, 349 U.S. 133 (1955).

B. The Respondents Have Conceded That They Based Their Ruling On Their Changes to The Uncontested Factual Record That Was Before Them, And That The Uncontested Factual Record Demonstrates That The Trial Judge Had An Improper Ex Parte Meeting With A Party To The Litigation During

The Pendency Of The Case, And Tried To Hide It From The Defendants.

Yet, in their decision of November 18, 2008, which is reported as Zabin et al v. Picciotto et al, 73 Mass. App. Ct. 141; 896 N.E.2d 937 (2008) Mass. App. LEXIS 1135 [*see* item d. at Pet. App. 40a - 41a], the Respondents (Appellate Justices) wrongly stated as follows:[11]

> d. The defendants contend that the judge met, outside the courtroom, with **a partner of one of the attorneys representing the plaintiffs**, for the purpose of discussing the possibility of the judge becoming a trustee of the board of alumni at the law school from which both had graduated. There is no allegation that the instant litigation was mentioned during the meeting. Even accepting the allegation as true, **there is no suggestion in the record** that the judge pursued the possibility, or **that any feature of the encounter raises a question of the judge's impartiality**. See Demoulas v. Demoulas Super Mkts., Inc., 428 Mass. 543, 551-552 (1998). We discern no due process violation.

---

[11] (Emphases is added to reflect the Respondents' factual errors and changes to the uncontested record]

The above findings and rulings of the Massachusetts Appeals Court are in **direct contradiction** of the written factual uncontested record that was before the court. It was repeatedly made clear to the Respondents that the party who had the improper *ex parte* meeting with the judge, Robert V. Costello, was strictly in the capacity of a "plaintiff" party in the underlying action, and that there were several pre-trial affidavits of bias filed with the court, not only by the defendants, but their trial attorney.[12]

The Respondents were further provided with a sworn affidavit from the trial attorney attesting to the trial judge's creation of a false record, his refusal to allow a stenographic record, and his false statements to the jury during the trial.[13]

It should be noted that during the period of time that Judge Sikora had jurisdiction over the subject action, he was actively seeking to be elevated to a higher court. Mr. Costello was in a position to influence and facilitate such an advancement. In Massachusetts, judges are not elected, but are proposed by a Judicial Nominating Commission, which is made up, for the most part, of attorneys, and no public access to the decision-making or as to who may have influenced the decision is allowed. However, after the trial, but during the time that he still had jurisdiction over the case, Judge Sikora was nominated to be a justice in the very same

---

[12] After the *ex parte* meeting, Judge Sikora assumed his own *de facto* assignment, without complying with the requirements of Massachusetts Superior Court Standing Order 9-80.

[13] There were no countervailing affidavits to any of the facts.

Massachusetts Appeals Court that rewrote his state court record.

As stated in the facts, the trial judge divested himself of in *rem* jurisdiction of the interpleader action and, converted the action, while leaving the Petitioners with the reasonable belief that they were still involved in an interpleader action pursuant to Mass. R. Civ. P. 22, and would be entitled to timely present claims to their own settlement funds to a jury. Judge Sikora barred them that right, and he made false rulings that ensured the Petitioners would be left with very small portions of the amounts for which they had settled their claims, if any. Owing to the favorable rulings and conduct of Judge Sikora, Mr. Costello's firm (Schneider, Reilly, Zabin & Costello, P.C.) was awarded $1,804,037.08 above and beyond what the jury awarded his firm.

That, combined with the other evidence in the subject case, would lead an impartial fact finder to the reasonable conclusion that there was much more that occurred in the improper *ex parte* meeting than either party disclosed to the Petitioners, and that due process was violated when the trial judge first concealed, and then denied, the truth of his *ex parte* meeting with Mr. Costello, and then refused to recuse himself from the case.

The action of the trial judge and Mr. Costello constitutes a violation of 18 U.S.C. § 1341 and 18 U.S.C § 1346. The trial judge "had a duty to perform impartially, without affording either side an unfair advantage or secret access to the court.'"; United States of America v. Bobby B. DeLaughter (2009) U.S. Dist. LEXIS 48483. Mr. Costello, as an officer of the Massachusetts courts, had an ethical duty to

refrain from wrongly contacting and/or influencing his trial judge. Massachusetts SJC Rule 3:07 § 3.4(a)(b) specifically prohibits *ex parte* communications with a judge seeking to influence said judge.

Due Process Requires That A Judge Cannot Have An Improper Ex Parte Meeting With A Party To The Litigation

"When an ex parte communication occurs, the Sunshine Act requires disclosure of the communication . . ." 5 U.S.C.S. § 557(d)(1)(C). There are no exceptions to the disclosure requirement." Electric Power Supply Association, Petitioner v. Federal Energy Regulatory Commission, Respondent Massachusetts Municipal Wholesale Electric Company, Et Al., Intervenors, The District Of Columbia Circuit, 391 F.3d 1255; 364 U.S. App. D.C. 48 (2004). Judge Sikora's deliberate concealment of the improper *ex parte* communication violates due process.

"By engaging in ex parte communications with litigants, a judge denies the parties the safeguards afforded them as well as their expectations that they can present evidence to an unbiased trier of fact, thereby disrupting the requirement of order and decorum in proceedings before the judge."; Commission On Judicial Performance V. Joseph Lewis No. 2004-Jp-01002-Sct Supreme Court Of Mississippi, 913 So. 2d 266 (2005).

In the recent Supreme Court case of Caperton v. Massey, 1556 U.S.___ ; 129 S.Ct. 2252: 173 L.Ed.2d 1208; 2009 U.S. LEXIS 4157, the United States Supreme Court ruled that the question of disqualification focuses on whether an objective assessment of the judge's conduct produces a reasonable question about impartiality, and "not on the judge's perception of the ability to act fairly." Certainly a judge who meets *ex parte* with a plaintiff to the litigation but tries to conceal the meeting, conducts a "circus-like" trial with jurors dressed in Halloween costumes, and allows the attorneys for the party he met with to gift jurors with joke memorabilia and candies, gives the impression that the judge lacks the ability to conduct a trial with proper decorum and act fairly. Moreover, in the recent Caperton v. Massey case, *supra*, the Supreme Court went on to rule:

> Courts in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. **Judicial integrity is, in consequence, a state interest of the highest order**." *Republican Party of Minn. V. White*, 536 U.S. 765, 793 (2002) (KENNEDY, J. concurring) [Emphases added]

If the Due Process Clause requires recusal only when a party could prove actual bias arising from personal animus in the judge's heart or cold cash in the judge's pocket, then the rights of parties to a fair and impartial judge would be imperiled. Probabilities of unfairness, likelihood of bias, and unacceptable perceptions are at the heart of circumstantial evidence, which is sometimes the only evidence available on the issue of whether a judge is constitutionally required to disqualify. Few of the cases of the Supreme Court of the United States involving due process challenges to a judge involve direct evidence of bias; instead, they involve circumstances where the probability of judicial bias is intolerable, regardless of the particular judge's actual state of mind. When a challenge was lodged to a conviction rendered by a judge and mayor who received nothing for acquittal, the Court held: "[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average mans as a judge to forget the burden of proof . . . or which might lead him not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law." Tumey v. Ohio, 273 U.S. 510, 532 (1927). The Supreme Court did not consider whether the adjudicator was actually biased. Rather, the Court evaluated *the circumstances* and decided that the probability of bias for this judge was too great for the Constitution to countenance.

Due process would risk being a mere façade if it ignored all concerns about "the probability of unfairness." Withrow v. Larkin, 421 U.S. 35, 47 (1975); "[not] only is a biased decision maker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness'" (quoting In re Murchison, 349 U.S. 133, 136 (1955). Fairness of course requires an absence of actual bias in the trial of case. But our system of law has always endeavored to prevent even the probability of unfairness.

"The requirement of neutrality has been jealously guarded by the Supreme Court." Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980). To give litigants the benefit of an unbiased and impartial judge, the Constitution forbids procedures that create the possibility that prejudice will result. *See* Connally v. Georgia, 429 U.S. 245, 250-251 (1977); ("even if there is no showing of actual bias in the tribunal, . . . due process is denied by circumstances that create the likelihood or the appearance of bias."); Turner v. Louisiana, 379 U.S. 466 (1965). This "stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weight the scales of justice equally between contending parties."; In re Murchison, 349 U.S. at 136.

The "inquiry must be not only whether there was actual bias on [the judge's] part, but also whether there was such likelihood of bias or an appearance of bias that the judge was unable to hold the balance . . . "; Taylor v. Hayes, 418 U.S. 488, 501 (1974), quoting Ungar v. Sarafite, 376 U.S. 575, 588 (1964).

The appearance of likely bias is relevant not solely to public perception and confidence in the judicial system, but may be the only evidence of actual bias. Often there is simply no provable evidence of actual bias; even the judge might be unconscious of its presence. Indeed, appearances arising from specific facts may be the only indication that actual bias is present in fact. While there is a presumption of integrity in the judiciary, the very fact that it is merely a presumption indicates that in some situations it can and will be overcome. Thus, in evaluating whether a judge's potential bias violates a litigant's due process rights, the question is not whether a judge may be able to resist the temptation of partiality. Rather, the question is whether a judge could possibly even be tempted under the circumstances.

C. Ordering Litigants To Forfeit Millions Of Dollars In Excessive Punitive Interest And Costs, Even Though The Money Was Put On Deposit In The Court Register For An Interpleader Action, Is In Violation Of The Eighth Amendment And The Fourteenth Amendment Of The United States Constitution.

The court-deposited settlement proceeds were at all times in the control of the court. The jury award to the Zabin/Costello parties was

$1,057,057.60 However, the court's award of 12% interest and costs enriched the Costello/Zabin parties by an additional $1,804,037.08 "If the amount of the forfeiture is grossly disproportional to the gravity of the triggering offense, it is unconstitutional."; United States v. Bajakajian, 524 U.S. 321, 328, 118 S. Ct. 2008, 141 L.Ed. 314 (1998).

The Respondents' actions have caused serious injury and have substantially affected the property rights of the Petitioners, including, but by no means limited to, violations of the guarantees of the Eighth Amendment of the U.S. Constitution (which is applicable to the states under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution); Copper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433-434, 121 S.Ct. 1678, 149 L.Ed. 2d 674 (2001)). The Eighth Amendment "limits the government's power to extract payments, whether in cash or in kind, as a punishment for some offense."; United States v. Bajakajian, 524 U.S. 321, 328, 118 S. Ct. 2008, 141 L.Ed. 314 (1998).

In addition to the issue of Costello's unfair overreaching to force the former clients of his firm into court [14], forcing the litigants to forfeit millions of dollars to insiders of the court through a post-judgment "punishment" interest even though:

- the settling parties had been induced to agree to the court deposit on the premise that it would be an *interpleader action*, which would

---

[14] (which the trial judge barred from the jurors' knowledge)

result in interest being added to amounts determined to be owed from the funds at issue only at the rate earned by such funds while invested by the court in which the funds were deposited;

- the Petitioners had moved to pay the attorney-lienholders their judgments[15];
- the attorney-lienholders refused to accept payment of their judgments; and
- After the Respondents, themselves, found that the settling parties had no control over and "did not have access to the settlement proceeds" held by the court. [16]

This constitutes a type of punishment that is prohibited under the Eighth Amendment of the United States Constitution.

Other courts looking at this issue of law have ruled that, ". . . interest is not allowed on the fund in question for the period during which it is on deposit in the registry of the court." Powers v. Metropolitan Life Insurance Company, 142 App. DC 95m 439 F2d 605 (1971), quoting 45 Am.Jur.2d Interpleader § 40 (1969); Anno. 15 A.L.R.2d 473 (1951). *See also* Osborn v. Bank of United States, 22 U.S. (9 Wheat.)

---

[15] The Petitioners moved the state court to pay the attorney parties their judgments as far back as 2002. Moreover, during the time at issue, the money was in the court register, and the Petitioners had no possession or control of that fund.

[16] *See* ruling of the Respondents in Zabin v. Picciotto, 73 Mass. App. 141; 896 N.E.2d 937 (2008) [paragraph 2 of App. 48a and line 3 at App. 49a]

738, 6 L. Ed. 204 (1824). *See also* Amoco Transport Company v. Dietze, Inc., 582 Fed. Supp. 804 (1984); and AMC 2586 (SD NY 1984).

Yet, the State provided a statutory 12% interest[17] award to the Costello/Zabin parties, pursuant to Massachusetts statute M.G.L. c. 231 § 6C. This Court is requested to rule on whether 12% statutory interest should be added with respect to an award of attorneys' fees from clients' settlement proceeds that have been deposited with a court when such proceeds have only earned interest at a rate of approximately 1% while invested by the court.

D. The Respondents Have Conceded That They Erred In Reviewing The Prayers For Relief That Were Submitted To Them Through The Appellate Briefs, And That Substantial Harm Resulted, But They Arbitrarily Refused To Grant Any Relief.

The Respondents stated that they based their decision and order on the written record. Yet, on page 20, footnote 26 of their ruling and order of November 18, 2008, the Respondents stated as follows:

> The defendants' separate contention that postjudgment interest should not have accrued, because no final judgment

---

[17] The money on deposit in the court register was earning approximately 1% per annum.

entered is disposed of by our conclusion, *supra*, that final judgment did enter.

Said findings and ruling of the Respondents are in direct contradiction to the arguments and prayers for relief that the Petitioners had set forth in an effort to cause them to address the award of such excessive interest. The Petitioners argued, among other things, that they were led to believe that, if they agreed to allow the settlement proceeds to be deposited into the court, interest would accrue at the rate generated by the court's investment of such proceeds. The Respondents have ignored the Petitioners' argument that changing the rules, after the fact, and without notice to the settling parties, in order to take away from them millions of dollars more than the jury awarded, is unjust. It constitutes an excessive fine, and a deprivation of property without due process of law, in violation of the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution.

The uncontested written record in front of the Respondents establishes that:

1. After the judgment was entered on October 24, 2002, the Petitioners moved the Suffolk Superior Court to pay the attorney-lienholders their judgments, including their pre-judgment interest and costs, and release the remaining funds to all of the defendants (the former clients) in said action.

2. The attorney-lienholders opposed the motion and refused to accept the money.

Therefore, the award to the attorney-lienholders of the amounts of post-judgment interest that they received constitutes a deprivation of the former clients' property without providing such former clients with due process of law. *See* Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969); see also Fuentes v. Shevin,407 U.S. 67 (1972); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); and Cf. Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). As occurred in the instant case, the over-reaching strategy of the attorney-lienholders, and the attendant tainted litigation, creates a condition in which attorneys receive the injured Petitioners' entire settlements[18], and the Petitioners will receive nothing.[19]

After Costello's firm obtained a judgment of $1,057,057.60, but subsequently refused to be paid from the settlement proceeds being held by the court, the court awarded said firm an additional $1,804,037.08 in interest, for a total of nearly $3

---

[18] The counsel Judge Sikora imposed against the Petitioner Melita Picciotto's will, charged Ms. Picciotto $3.5 million dollars to defend her from the overreaching of the prior attorneys.

[19] The Respondents also misunderstood the facts on the amount of money that the Petitioners received. The state court specified that the money it was releasing was to be used by the attorneys who represented the Petitioners and be released to other parties in the underlying case. That attorneys charged more than $3.5 million, for the defense, leaving the Petitioners in poverty, causing the loss of their home, and owing attorneys far more than the sums they had settled for, after forcing them into a litigation that they had made all reasonable efforts to avoid.

million to that firm alone. Because of the interest award, the other attorney-lienholders were also enriched by millions of dollars over the jury award. Furthermore, because of the legal fees charged to defend, the Petitioners now owe far more than they settled for.

Such award of interest was made even though the Massachusetts Appeals Court held that the Petitioners (and the other settling parties) could not be charged with having wrongly retained the money that was awarded to the attorney-lienholders by ruling as follows:[20]

> As a strictly technical matter [the Petitioners] did not obtain control of the settlement proceeds upon the conclusion of the settlement agreement with Travelers . . . as we have discussed above, several of the plaintiffs sought fees in quantum meruit . . . unless and until the competing claims of the various attorney lienholders were determined [the Petitioners] did not have access to the settlement proceeds. Pending final judgment in the present litigation, [the Petitioners] w[ere] not in breach of arrangement . . .much less guilty of unfair or deceptive acts or practices by reason of [their] failure to pay [the attorney lienholders].

---

[20] *See* ruling of the Respondents in Zabin v. Picciotto, 73 Mass. App. 141; 896 N.E.2d 937 (2008) [*see* paragraph 2 of Pet. App. 48a and top paragraph at App. 49a]

Furthermore, an interest award that doubles or trebles the amount of a judgment that the Petitioners had offered to pay, but that the opposition refused to accept, is unduly punitive, and in violation of the Eighth and Fourteenth Amendments of the United States Constitution.; *see* United States v. Bajakajian, 524 U.S. 321, 328, 118 S. Ct. 2008, 141 L.Ed. 314 (1998).

E. Due Process Is Violated When A Trial Devolves Into A "Circus" Of Jurors Wearing Halloween Costumes And The Trial Judge Allows The Opposition To Pass The Jurors Candy And Joke Memorabilia.

The trial judge allowed the jurors to come to court and listen to testimony for an entire day while dressed as, among other things, a priest, a stop light, a nun, an English judge (with a wig), court jesters and clowns. Thereafter, the courtroom atmosphere became more like a big party than a somber court proceeding. The lawyers representing the attorney-lienholders interacted inappropriately with the jurors, passed candies to them, praised them for their wonderful costumes, informed them they were "the talk of the courthouse." They also passed the jurors a suggested cast list as to who would play each of the participants in the trial, suggesting that the trial eventually would be turned into a movie. They further passed out joke bumper stickers to the jurors.

The Petitioners were beyond disheartened; they were literally sickened by it. It was obvious to them just what was being celebrated: the wrongful transfer of property.

Petitioner Melita Picciotto instructed her court-imposed counsel to object, and to seek a mistrial.[21] The Petitioner informed court-imposed counsel that she had never consented to such a spectacle and it upset her. Furthermore, the continuous personal interactions of the attorneys who represented the attorney-lienholders and their continuous gifting to the jury was unacceptable. Attorney Casher has averred under oath that she had objected to Attorney Rossman and Attorney Stone (the attorneys for Costello's firm) passing candies to the jurors. The objections and the motion for a mistrial, as have so many other portions of the record, have disappeared, *i.e.*, the court reported the trial tapes "lost."[22]

In a trial a party is entitled to judicial serenity and calm. *See* Estes v. Texas, 381 U.S. 532, 536 (1965). Court proceedings are held for the solemn

---

[21] The trial judge also had the American flag removed from his courtroom, so sworn testimony was provided to the jury without the requisite American flag present.

[22] The Respondents addressed this issue by stating that since there was no record of it in the trial transcript, the Petitioners had lost their appellate rights on the argument. However, the tapes that contained the objection were "lost" while in the possession of the court, and the opposition did not contest that the incident occurred. Moreover, the Petitioners' trial attorney averred in the underlying record that the conduct had occurred, and that she had objected to it.

purpose of endeavoring to ascertain the truth, which is the *sine qua non* of a fair trial. Over the centuries Anglo-American courts have devised careful safeguards by rule and otherwise to protect and to facilitate the performance of this high function. To perform its high function in the best way 'justice must satisfy the appearance of justice.

The non-solemn atmosphere, indeed what the press characterized as a "circus" environment, does not comport with a fair trial. Furthermore, the court's allowance of the attorney-lienholders' lawyers to interact with jurors in an overly-friendly, jovial, and influence-peddling way undermined the entitlement of the Petitioners and the other settling parties to a fair trial.

F. The State Court Judgment Violated Due Process Because The State Court Deprived Petitioner Melita Picciotto Of The Right To Represent Herself In Defense Of Her Property, Imposed Counsel Upon Her Who Was Ordered To Be A Material Witness Against Her At Trial, And Then Denied The Petitioners The Right To Cross-Examine Said Counsel/Material Witness At Trial.

Pre-trial, Petitioner Melita Picciotto moved on an emergency bases to be allowed to represent herself in the subject action, citing a constitutionally guaranteed right to self-representation. On October 13, 2000, another state court judge (Volterra, J.)

agreed, and ordered that that the Petitioner be allowed to represent herself *pro se* in the subject action and that Judge Sikora be notified of his decision. Judge Sikora refused to honor the ruling, and informed the Petitioner that she did not speak in his court *as a matter of right* but subject to his "grace." His position was that the Petitioner had no right, constitutional, civil, or otherwise, to speak in his court in defense of her property, irrespective of what another judge had ruled. In the ultimate display of bias, when she tried to speak, Judge Sikora openly stated on the record that his only interest was in hearing from the attorney parties, and not from the Petitioner.

"Authorities are split on whether there is a constitutional right to proceed pro se in civil cases." University of Chicago Law Review, 55 U. Chi. L. Rev. 659 (Spring 1988), quoting Fordham Law Review, 55 Fordham L. Rev. 1109 (May 1987):

> See Adams, 317 U.S. at 279 (answering affirmatively); Garrison v. Lacey, 362 F.2d 798, 799 (10th Cir. 1966) (same), cert. denied, 387 U.S. 911 (1967). But see Andrews v. Bechtel Power Corp., 780 F.2d 124, 137 (1st Cir. 1985) (answering negatively), cert. denied, 106 S. Ct. 2896 (1986); O'Reilly v. New York Times, 692 F.2d 863, 867 (2d Cir. 1982) (same). Legitimate arguments have been advanced for both sides. Compare Comment, On Letting the Laity Litigate: The Petition Clause and Unauthorized Practice Rules, 132 U. Pa. L. Rev. 1515, 1531-32 (1984)

> (constitutional right to appear pro se in civil cases), with Kaufman, The Right of Self-Representation and the Power of Jury Nullification, 28 Case W. Res. 269, 271 n.7 (1978) (no constitutional right to appear pro se in civil cases). The Faretta court reasoned that criminal defendants have the right to appear pro se because the criminal defendant personally bears the consequences of defeat and that to thrust a lawyer on a criminal defendant is likely to convince him that the justice system is against him. See Faretta v. California, 422 U.S. 806, 834 (1975).

In 1777, Thomas Paine argued that the right to represent oneself in civil cases was a natural right. And that the right to defend one's life, liberty, or property by oneself, is among those fundamental principles of liberty and justice, which lie at the base of all our civil and political institutions. The controversy continues. In the case of Salvador Martinez v. Court of Appeals California 4th Appellate District, 528 U.S.152, 165 (2002), while concurring in the Judgment of the majority of the Court, which upheld Ferreta, Justice Scalia stated, "While I might have rested my decision upon the Due Process Clause rather than the Sixth Amendment, I believe it was correct." Salvador Martinez v. Court of Appeals California 4th Appellate District, *supra.* Since a controversy exists, this Court should clarify

whether or not the right of self-representation in defense of one's property is a constitutional and due process right.

Furthermore, the Petitioner informed the state court that she was firing the court-imposed counsel because she had committed malpractice. Judge Sikora stated that he felt it was "a ploy," even though he later ruled that because the court-imposed counsel had failed to file the proper pleadings, the Petitioner had no claim to her own court-deposited settlement proceeds, so her claims could not go to the jury in the action. As a result, the Petitioner's property has been distributed to attorneys who never represented her in any action.

The Petitioner also informed the court that she objected to the court-imposed counsel's representation because the Petitioner believed that said counsel was being forced to represent conflicting interests between said counsel's clients, as well as herself, which rendered her representation of the Petitioner ineffective. This conflict is something that even the court-imposed counsel admitted to Judge Sikora, citing it as a reason she was not comfortable representing the Petitioner.

Further, the Petitioner objected to being represented by an attorney who was slated to testify against her at trial where the court would not allow the Petitioner (or anyone) to cross examine the attorney. Judge Sikora still refused to honor Judge Volterra's ruling, or the provisions of either the Massachusetts or the United States Constitution. After said counsel had been called as a witness by

the attorney-lienholders, the Petitioner moved to be allowed, at the very least, to cross-examine her court-imposed counsel while sais counsel was *on the stand* at the trial. Judge Sikora refused, no matter how brief such cross-examination would be.

The factual, uncontested record in front of the Respondents clearly and unambiguously showed that:

> 1) The Petitioners were not represented by counsel at Attorney Casher's deposition;
>
> 2) The deposition of Dana Casher was suspended and adjourned by the attorneys who took Ms. Casher's deposition before their direct examination of Ms. Casher had been concluded;
>
> 3) Therefore, there never was an opportunity afforded for the counsel for Dana Casher or for the Petitioners to cross-examine Ms. Casher in her deposition;
>
> 4) As a result, Dana Casher's deposition testimony was never subjected to cross-examination; and
>
> 5) Consequently, the Respondents based their decision as to the deposition on erroneous "facts," and never addressed the issue raised by the Petitioners that it was error to allow prerecorded testimony of their trial attorney to be introduced into

> evidence that had not been subjected to cross-examination.

The right of cross-examination is *fundamental* to the fair treatment of parties in litigation. Parties to litigation are entitled, as a matter of right, to the reasonable cross-examination of witnesses used against them for the purpose of attempting to impeach or discredit their testimony.

Since the deposition of Attorney Casher was suspended and adjourned by the plaintiffs in the underlying action, the testimony of Petitioners' attorney that was admitted constituted an *ex parte* examination. *See* Crawford v. Washington, 541 U.S. 36 (2004).

Testimony that is not subject to cross-examination is inadmissible at trial; "The right to cross-examination . . . is essentially a 'functional' right designed to promote reliability in the truth-finding functions of a . . . trial."; Crawford v. Washington, *ibid.* "A witness . . . [during cross examination] . . . might refine, reformulate, reconsider, or even recant earlier statements."; Melendez-Diaz v. Massachusetts, 557 U.S. ____ (2009). However, this Court has not been explicit if said right applies only to criminal defendants, therefore the petitioner is seeking a ruling on that issue.

CONCLUSION

An intermediate appellate court is not a fact finder court, and cannot change the uncontested factual record that is before them. The Petitioners have a legal right to obtain a ruling that is based on the facts. *See* Cooker & Gell v. Hartmarx Corp., *supra*. The facts of this case prove that the trial judge used his position of power to enrich a social friend of his who was a party to the litigation. That triggers the guarantees of the federal constitution. However, with the writ of error abolished in most states, there is no mandatory review, *i.e.*, no remedy at law to correct intermediate state court rulings based on fabricated records. This court must establish guidelines to provide a remedy for such wrongs. Judicial integrity is a national and state interest of the highest order. Therefore, this Court should issue writ.

Respectfully submitted,

Melita Picciotto
Judith Picciotto
Stefano Picciotto

September 2, 2010